MACQUARIE (MALAYSIA) SDN BHD

v.

HSBC BANK MALAYSIA BHD & ANOR AND ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA
ZULKEFLI MAKINUDIN JCA
LOW HOP BING JCA
[CIVIL APPEAL NOS: W-03-10-2006 & W-03-11-2006]
17 SEPTEMBER 2007

CIVIL PROCEDURE: *Judgment - Default judgment - Setting aside - Application made by plaintiff in whose favour judgment entered - Whether court has jurisdiction to determine application - Whether court is functus officio if default judgment perfected - Whether jurisdiction to set aside can be exercised in limited circumstances - Rules of the High Court 1980, O. 92 r. 4*

In this case the plaintiff was estopped from claiming against the first defendant when it obtained a default judgment against the second defendant. The first defendant's right to raise the issue of election in an amended defence, though at first dismissed by the High Court, was subsequently affirmed by the appellate courts. The plaintiff then applied to set aside the default judgment ('the impugned application') in the High Court. The dismissal of the impugned application was now the subject matter of the appeals herein.

Held (dismissing the appeals)
Per Low Hop Bing JCA:

(1) On a preponderance of authorities, the High Court is vested with jurisdiction to consider and determine the impugned application and this is consistent with O. 92 r. 4 of the Rules of the High Court 1980 ('RHC'). (paras 36 & 37)

(2) The principles enunciated in *Hock Hua Bank Bhd v. Sahari Murid*, *Badiaddin Mohd. Mahadin v. Arab Malaysian Finance Berhad* and *Selvam Holdings (Malaysia) Sdn Bhd v. Grant Kenyon & Eckhardt Sdn Bhd* establish that the court is not *functus officio* even though a default judgment has been perfected. However, these three authorities have also

reaffirmed that the jurisdiction to set aside such a judgment is not to be exercised as a matter of course, like day following night. The jurisdiction may be exercised in the following limited circumstances only, *ie*, where there is (a) breach of the rules of natural justice, (b) lack of jurisdiction, (c) illegality, *ie*, contravention of a substantive statutory provision, (d) serious defect, or (e) fraud. In the present case, the plaintiff must discharge the burden of proving that the impugned application came within the ambit of any of those limited circumstances. (paras 45 & 46)

(3) The impugned application was made for the purpose of forestalling, pre-empting or preventing the first defendant from raising the issue of election in the amended defence at the trial where the merits or otherwise thereof would have to be considered and determined in due course. The impugned application, if allowed, would have the effect of stifling or negating the earlier order of this court. It was an obvious illustration of an abuse of the process of the court which should not be permitted and which O. 92 r. 4 RHC sought to prevent. (para 54)

(4) On whether there was mistake on the part of the plaintiff's solicitors, it should be emphasised that the default judgment was obtained by the plaintiff at the instance of the plaintiff's solicitors who must have properly and meticulously considered the implications thereof. The plaintiff's solicitors also made no effort to rectify the mistake timeously. It was only after some 47 months that they took steps to file the impugned application. As they had not moved quickly to apply to set aside the default judgment, the irresistible inference is that they were holding affirmatively and positively to the default judgment. That delay in filing the impugned application was inordinate, and the act of the plaintiff's solicitors in obtaining the default judgment could hardly be construed as a mistake. (paras 57 & 58)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif dalam kes ini telah dihalang dari menuntut terhadap defendan pertama setelah mendapat penghakiman ingkar terhadap defendan kedua. Hak defendan pertama untuk membangkitkan isu pilihan di dalam penyataan tuntutan terpinda, walaupun mulanya

ditolak oleh Mahkamah Tinggi, telah kemudiannya disahkan oleh mahkamah-mahkamah rayuan. Plaintif kemudian memohon untuk mengenepikan penghakiman ingkar ('permohonan yang dicabar') di Mahkamah Tinggi. Penolakan permohonan yang dicabar kini menjadi pokok persoalan rayuan-rayuan di sini.

Diputuskan (menolak rayuan-rayuan)
Oleh Low Hop Bing HMR:

(1) Berdasarkan autoriti-autoriti yang kuat, Mahkamah Tinggi mempunyai bidangkuasa untuk mempertimbang dan memutuskan mengenai permohonan dicabar di mana ini adalah konsisten dengan A. 92 k. 4 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT').

(2) Prinsip-prinsip yang diutarakan di dalam *Hock Hua Bank Bhd v. Sahari Murid*, *Badiaddin Mohd. Mahadin v. Arab Malaysian Finance Berhad* dan *Selvam Holdings (Malaysia) Sdn Bhd v. Grant Kenyon & Eckhardt Sdn Bhd* menunjukkan bahawa mahkamah tidak *functus officio* walaupun suatu penghakiman ingkar telah disempurnakan. Bagaimanapun, ketiga-tiga autoriti ini juga mengesahkan bahawa bidangkuasa untuk mengenepikan penghakiman sedemikian tidak harus dilaksanakan sebagai suatu perkara mudah ibarat hari berganti malam. Bidangkuasa ini hanya boleh dilaksanakan dalam halkeadaan-halkeadaan berikut sahaja, iaitu, di mana terdapat (a) pelanggaran terhadap kaedah keadilan semulajadi, (b) ketandusan bidangkuasa, (c) ketidaksahan, iaitu pelanggaran terhadap peruntukan statutori substantif, (d) kecacatan serius, atau (e) fraud. Dalam kes semasa, plaintif hendaklah membuktikan bahawa permohonan yang dicabar dirangkumi oleh mana-mana halkeadaan yang terhad tersebut.

(3) Permohonan yang dicabar dibuat bagi maksud menghalang defendan pertama dari membangkitkan isu pilihan di dalam pembelaan terpinda sewaktu perbicaraan, di mana merit atau sebaliknya isu tersebut akan dipertimbang dan diputuskan. Permohonan yang dicabar, jika dibenarkan atau sebaliknya akan mempunyai kesan melumpuhkan atau menolak perintah terdahulu mahkamah ini. Ini satu ilustrasi jelas salah guna proses mahkamah. Ia tidak boleh dibenarkan dan dihalang oleh A. 92 k. 4 KMT.

A **(4)** Berhubung sama ada terdapat kesilapan di pihak peguamcara plaintif, ianya harus ditekankan bahawa penghakiman ingkar diperoleh oleh plaintif atas permohonan peguamcara plaintif yang tentunya telah menimbang dengan teliti akan segala implikasinya. Peguamcara plaintif juga tidak membuat sebarang
B usaha untuk memperbetulkan kesilapan dengan kadar segera. Mereka hanya mengambil langkah memfail permohonan yang dicabar setelah 47 bulan berlalu. Oleh kerana mereka tidak bertindak dengan cepat untuk memohon mengenepikan penghakiman ingkar, maka inferens yang tidak dapat dielakkan
C adalah bahawa mereka berpegang teguh kepada penghakiman ingkar tersebut. Kelengahan untuk memfail permohonan yang dicabar adalah tidak munasabah, dan tindakan peguamcara plaintif dalam mendapatkan penghakiman ingkar tidak sayugianya dianggap sebagai satu kesilapan.

D

Case(s) referred to:

Badiaddin Mohd Mahadin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Cannan & Ors v. Reynolds And Service, 5 EL & BL 299 [301] 493 ***(refd)***

City of Westminster v. Reema Construction Ltd & Ors 20 Con LR 44 ***(refd)***

E *Cross & Co v. Mathews & Wallace [1903-1904] Vol XX TLR 603* ***(refd)***

Hock Hua Bank Bhd v. Sahari Murid [1981] 1 MLJ 143 ***(refd)***

HSBC Bank Malaysia Bhd v. MacQuarie Technologies (Malaysia) Sdn Bhd [2004] 3 CLJ 121 CA ***(refd)***

MacQuarie Bank Ltd v. Beaconsfield & Ors [1992] 2 VR 461 ***(refd)***

F *S Kaprow & Co Ltd v. Maclelland & Co Ltd [1948] 1 KB 618 CA* ***(refd)***

Selvam Holdings (Malaysia) Sdn Bhd v. Grant Kenyon & Eckhardt Sdn Bhd [2000] 3 CLJ 16 CA ***(refd)***

The Bank of Nova Scotia v. Kostuchuk [2003] 173 Man R (2d) and 293 WAC 262 ***(refd)***

G **Legislation referred to:**

Malay Reservations Enactment (FMS Cap 142), s. 13

Rules of the High Court 1980, O. 42 r. 13, O. 92 r. 4

Rules of the Supreme Court [UK], O. 19 r. 9

H *For the appellant - Su Tiang Joo; M/s Cheah Teh & Su*

For the 1st respondent - Andrew Chiew Ban Vooi; M/s Lee Hishammuddin Allen & Gledhill

[Appeal from High Court, Kuala Lumpur; Suit No: D7-22-714-2000]

I *Reported by Usha Thiagarajah*

JUDGMENT

Low Hop Bing JCA:

Introduction

[1] These two related appeals *viz* Court of Appeal Civil Appeal No. W-03-10-2006 ("Civil Appeal No. 10") and Civil Appeal No. W-03-11-2006 ("Civil Appeal No. 11") were lodged by the appellant – plaintiff ("the plaintiff") against the decision of the learned judge of the Kuala Lumpur High Court given on 8 December 2005 whereby the plaintiff's application, to set aside the default judgment which the plaintiff had entered against the second respondent ("the second defendant") on 16 January 2001, was dismissed with costs.

[2] The facts, issues and parties in these two appeals are the same. Submissions were presented in Civil Appeal No. 11. The parties have agreed that the decision of this Court in Civil Appeal No. 11 would be binding on the parties in Civil Appeal No. 10.

[3] After hearing submissions, we have on 9 January 2007 unanimously dismissed Civil Appeal No. 11 with costs. These are our grounds of judgment. (For brevity and convenience, a reference hereinafter to an order and a rule is a reference to that order and rule in the Rules of the High Court 1980, unless otherwise stated.)

Factual Background

[4] The plaintiff had a current account with HSBC Bank Malaysia Bhd, the first defendant. In 1998, 117 cheques were paid out by the first defendant and a total amount of RM483,591.21 was debited from the plaintiff's current account.

[5] The plaintiff alleged that the signatures on these cheques were forged by the second defendant and claimed against:

(a) the first defendant, on the ground that the forged cheques are wholly inoperative and that the first defendant was negligent in debiting the above amount from the plaintiff's current account; and

(b) the second defendant, for having fraudulently converted the cheques to her own use or, alternatively, for monies had and received.

[6] The plaintiff's claims are expressly pleaded and premised on joint and several liabilities.

[7] In its original defence, the first defendant did not plead that the plaintiff must elect to claim against either one of two defendants or against both.

[8] On 16 January 2001, the plaintiff entered default judgment against the second defendant who failed to turn up for case management.

[9] First defendant's counsel then requested for time to obtain an expert's report in relation to the signatures on the cheques. At the material time, first defendant's counsel did not indicate that the defence of election would be raised.

[10] Further case management was fixed for 23 February 2001.

[11] Meanwhile, on 22 January 2001, plaintiff's counsel served on defendant's counsel the draft judgment for the latter's approval. It was returned duly approved on 29 January 2001.

[12] On further case management dated 23 February 2001, defendant's counsel asked for time to study the expert's report. Case management was then fixed for 29 March 2001.

[13] On 29 March 2001, at the request of both parties, trial dates were fixed.

[14] On 4 October 2001, pursuant to another case management, parties were directed to file the necessary documents and witness' statements by 22 October 2001.

[15] On 25 October 2001, first defendant's counsel asked plaintiff's counsel whether the sealed default judgment has been extracted. When the answer was in the affirmative, first defendant's counsel instantly gave notice of the defence of election.

[16] On 5 November 2001, the first defendant applied to amend its defence to aver that as the plaintiff had elected to claim against the second defendant by entering judgment against the second defendant, the plaintiff is now estopped from claiming against the first defendant. That application was dismissed by the learned judge on 5 February 2002.

[17] On 28 February 2002, the first defendant appealed to this court.

[18] On 15 April 2004, this court allowed the first defendant's appeal and granted leave to the first defendant to amend its defence in terms as alluded to above: *HSBC Bank Malaysia Bhd. v. MacQuarie Technologies (Malaysia) Sdn. Bhd.* [2004] 3 CLJ 121 CA; per Nik Hashim JCA (now FCJ).

[19] On 14 May 2004, the plaintiff filed an application seeking leave to appeal to the Federal Court. The plaintiff's application for leave was dismissed by the Federal Court on 13 September 2004.

[20] On 9 December 2004, the plaintiff filed the application to set aside the default judgment ("the impugned application") which has neither been executed nor satisfied.

[21] When the impugned application came up for hearing on 3 March 2005, the second defendant did not attend despite having been served therewith. The first defendant attended and opposed the impugned application.

[22] On 8 December 2005, the learned judge dismissed the impugned application.

[23] This is the plaintiff's appeal against the aforesaid decision.

Jurisdiction

[24] Learned counsel Mr. Su Tiang Joo submitted for the plaintiff that our High Court has jurisdiction to allow the impugned application. He relied on authorities available from Commonwealth jurisdictions *viz*:

(a) England: *Cannan And Others v. Reynolds And Service*, 5 EL & BL 299 [301] 493; and *City of Westminster v. Reema Construction Ltd And Others*, 20 Con LR 44;

(b) Canada: *The Bank of Nova Scotia v. Kostuchuk* [2003] 173 Man. R (2d) and 293 WAC 262; and

(c) Australia: *MacQuarie Bank Ltd v. Beaconsfield And Others* [1992] 2 VR 461.

[25] First defendant's learned counsel Mr. Andrew Chiew Ban Vooi contended that there is no express provision for the court to set aside the default judgment obtained by the plaintiff upon the plaintiff's own application. He relied on *Cross & Co v. Mathews & Wallace* [1903-1904] Vol XX TLR 603.

[26] In our judgment, it is trite law that O. 42 r. 13 of the Rules of the High Court 1980 confers jurisdiction upon our High Court to set aside an order or judgment on the application of the party against whom the order or judgment has been obtained eg, the second defendant herein. For that purpose, the application must be made and served on the party who has obtained the order or judgment eg, the plaintiff herein.

[27] However, in the instant appeal, the impugned application was not made by the second defendant against whom the judgment has been obtained. It was instead made by the plaintiff in whose favour the judgment has been entered.

[28] The impugned application is arguably the first of its kind ever to be filed in our courts, as apparently no local judgment had been submitted for our consideration. It is therefore pertinent for us to consider authorities from Commonwealth jurisdictions.

[29] First, in *Cannan & Others*, *supra*, the plaintiff had obtained against the defendant a default judgment for an incorrect amount which the defendant knew was a mistake. As soon as the mistake was discovered, a summons to set aside the judgment was taken out by the plaintiff. It was held in England that the courts have a general equitable jurisdiction over their judgments.

[30] Order 19 r. 9 of the English Rules of the Supreme Court provided that the court may on such terms as it thinks just set aside or vary any judgment entered in pursuance of that order. This procedural rule was considered in *City of Westminster, supra*. There, the plaintiff's blocks of flats had developed defects which the plaintiff had employed the fourth defendant and the seventh defendant to put them right. The work was done in two phases, partly by the fourth defendant and the seventh defendant. The plaintiff alleged that both the fourth defendant and the seventh defendant had done their work badly and that they were each separately responsible for defects in different parts of the work. Interlocutory judgment was entered by the plaintiff against the seventh defendant, with damages to be assessed. The plaintiff

applied to set aside the interlocutory judgment. The English High Court held *inter alia* that under O. 19 r. 9, it has jurisdiction to set aside an interlocutory judgment for damages to be assessed.

[31] In *The Bank of Nova Scotia, supra*, Kostuchuk (K) borrowed monies from the bank on behalf of Bomek (B). B defaulted on the loans. The bank obtained default judgments against K for C$2,762.81 ("the first loan") and C$3,206.82 ("the second loan"). K satisfied both the judgments. Subsequently, the bank discovered that there was a mistake, as the amount owing on the second loan was C$26,285.29. The bank applied for the judgment and notice of satisfaction to be set aside. The Manitoba Court of Appeal in Canada followed *inter alia Cannan and Others, supra* and allowed the application. In the exercise of jurisdiction to set aside the default judgment on ground of mistake, the Court of Appeal explained in para [8] as follows:

> [8] The authorities provide that a court will set aside a default judgment where:
>
> (a) the plaintiff or its legal advisor has made a mistake, either in the pleading on which the default judgment is based or by entering default judgment against one or more defendants;
>
> (b) the plaintiff has moved quickly upon discovering the mistake to set aside the default judgment; and
>
> (c) the defendant has not acquired a vested right by virtue of the signing of the default judgment, such as the expiry of a statutory limitation, and the setting aside will not cause prejudice to the defendant that cannot be compensated for by costs and repayment of the judgment, if applicable.

[32] The final case cited for the plaintiff is *MacQuarie Bank Ltd, supra*, where the plaintiff bank claimed from the defendant-guarantor the sum of A$15,095,463 being the amount of a guaranteed debt together with interest, or alternatively damages. Upon the defendants' failure to deliver a defence, the plaintiff consciously and swiftly entered judgment in default for damages to be assessed. Three months later, the plaintiff applied to the court seeking to set aside the default judgment because it became concerned that the principal sum might not be recovered upon the assessment of damages. At the hearing of the application, the defendants conceded that the court had jurisdiction to set aside a default judgment on the application of the plaintiff, but contended

A that the plaintiff had elected to claim only damages and was therefore barred from seeking to set aside the judgment. In allowing the application and setting aside the judgment, the Supreme Court of Victoria, Australia held:

B (1) The discretion to set aside a default judgment pursuant to the rules of court is very wide and there is no need to lay down restrictive rules for applications on behalf of plaintiffs. Exceptional circumstances need not be shown and the discretion is to be exercised having regard to the justice of the C case;

(2) The plaintiff needs to show that some useful purpose can be served in setting aside the default judgment, that is, that on its statement of claim there is an arguable case for relief at trial different from that already obtained on default;
D

(3) Factors which may be taken into account in the exercise of the discretion to set aside a default judgment on the application of the plaintiff include the reason for taking the step of entering judgment, delay in seeking to have the E judgment set aside, reasons for that delay and whether there is any consequent prejudice or other prejudice which cannot be remedied; and

(4) Whatever criticism might be made of the plaintiff in F consciously and swiftly entering default judgment without warning, and in delaying three months before applying to have the judgment set aside, it would not be just to deprive the plaintiff of its right to sue for the recovery of a sum in excess of A$15 million.

G **[33]** The above authorities cited for the plaintiff are supportive of the plaintiff's submission on the jurisdiction point.

[34] On the other hand, in *Cross & Co., supra,* cited for the first defendant, two persons were sued in the High Court for the price H of goods supplied. Judgment was obtained by default against one, and the other had leave to defend, and the action was remitted to the county court. At the trial, the county court judge found as a fact that the debt was contracted by the former solely as agent for the latter, and that the plaintiff had given credit to the latter I alone. He adjourned the case to enable an application to be made to set aside the judgment against the agent. This was accordingly

done, and the judgment was set aside and the action against both defendants was remitted to the county court. At the second trial, the county court judge entered judgment for the agent and against the principal. On appeal, the English Court of Appeal held that the plaintiff by signing judgment against the agent had conclusively elected to proceed against him, and there was no power to set aside that judgment, so as to revive the right of the plaintiff to proceed against the principal.

[35] *Cross & Co, supra*, was considered in *City of Westminster, supra,* where Peter Bowsher QC learned judge of the English Queen's Bench, explained that *Cross & Co, supra,* was a case of alternative liability between principal and agent and the question of whether the election was irrevocable was not in issue. Hence, *Cross & Co, supra*, was accordingly distinguished in *City of Westminster, supra,* in which the application raised the issue of whether the election is revocable.

[36] We are of the view that on a preponderance of authorities, there can be no doubt that our High Court is vested with the jurisdiction to consider and determine the impugned application.

[37] Our view is supported and indeed consistent with O. 92 r. 4 which provides for the inherent powers of the court in the following words:

> For the removal of doubts it is hereby declared that nothing in the rules shall be deemed to limit or affect the inherent powers of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

Limited Circumstances For Setting Aside

[38] The plaintiff took the view that the court is not *functus officio*, even though the default judgment has been perfected, seeking support in:

(1) *Hock Hua Bank Bhd v. Sahari bin Murid* [1981] 1 MLJ 143 FC;

(2) *Badiaddin bin Mohd Mahadin & Anor v. Arab Malaysian Finance Bhd* [1998] 3 MLJ 393 FC; and

(3) *Selvam Holdings (Malaysia) Sdn. Bhd v. Grant Kenyon & Eckhardt Sdn. Bhd* [2000] 3 CLJ 16 CA;

[39] The first defendant argued to the contrary, as the default judgment had been sealed. *Hock Hua Bank, supra, Badiaddin, supra* and *Selvam Holding* were also cited in support.

[40] We would now embark on an analysis of the above authorities.

[41] The appeal in *Hock Hua Bank, supra,* was concerned with the jurisdiction of a judge to *inter alia* set aside a judgment regularly obtained, drawn up and perfected. The first instance judge had made an order for sale after hearing all the parties in a foreclosure proceeding. The order had been drawn up and perfected. There was no appeal against it. The respondent's application to set it aside was refused. Subsequently, the respondent applied again to set aside the previous orders. That subsequent application was allowed by the first instance judge. On appeal, the Federal Court in a judgment delivered by Chang Min Tat FJ (as he then was) held that the first instance judge was *functus officio* and that the court had no power under any application in the same action to *inter alia* set aside a judgment regularly obtained after it has been entered, or an order after it has been drawn up, unless it is a judgment by default or made in the absence of a party at the trial or hearing.

[42] The Federal Court added that where a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment (p. 144 E-G left).

[43] In *Badiaddin, supra,* the Federal Court referred to *Hock Hua Bank, supra,* and allowed a final order to be set aside on ground of illegality being in contravention of an express provision of a written law ie, s. 13 of the Malay Reservations Enactment (FMS Cap 142). At p. 409 Mohd Azmi FCJ (as he then was) explained that:

> It is settled law that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. But one special exception to this rule is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction. Apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the superior

courts to set aside an order of court *ex debito justitiae* to a category of cases involving orders which contravened 'any written law', the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception.

[44] The issue in *Selvam Holdings, supra,* was whether the High Court was *functus officio* once an order is drawn up and perfected. The Court of Appeal speaking through Siti Norma Yaakob JCA (later CJ(M)) followed *Hock Hua Bank, supra;* and *Badiaddin, supra,* and held that the court has unlimited jurisdiction to set aside orders:

(1) where the order contravenes a substantive statutory prohibition rendering it defective on grounds of illegality or lack of jurisdiction; and

(2) where in exceptional cases, the justice of the case requires the court to intervene and correct a serious defect in the order.

[45] We are of the view that principles enunciated in the above three authorities do buttress the plaintiff's contention that the court is not *functus officio* even though a default judgment has been perfected. However, these three authorities have also reaffirmed that the jurisdiction to set aside such a judgment is not to be exercised as a matter of course, like day following night, but may be exercised in limited circumstances only eg, where there is:

(a) breach of the rules of natural justice;

(b) lack of jurisdiction;

(c) illegality ie contravention of a substantive statutory provision;

(d) serious defect; or

(e) fraud.

[46] The plaintiff must discharge the burden of proving that the impugned application comes within the ambit of any of these limited circumstances.

[47] With the foregoing principles in mind, we shall now consider the merits of the instant appeal.

Abuse Of Process

[48] The plaintiff argued that the court can set aside the default judgment without deciding on the issue of election raised in the first defendant's amended defence. Support was sought in:

(1) *S. Kaprow & Ca Ltd v. Maclelland & Co. Ltd* [1948] 1 KB 618 CA;

(2) *City of Westminster, supra;* and

(3) *MacQuarie Bank Ltd, supra.*

(4) *Cannan, supra.*

[49] The first defendant responded that setting aside the default judgment would run counter to the earlier order of this court in *HSBC Bank Malaysia Bhd, supra,* which had allowed the first defendant to amend its defence to include the issue of election.

[50] Upon considering *S. Kaprow & Co. Limited, supra,* we found that the defendant there had applied to have the action stayed, which was allowed by the the English Court of Appeal.

[51] It is to be noted that the application in *S. Kaprow & Co. Limited, supra,* for a stay of the action is readily distinguishable from that in the instant appeal which concerns an application to set aside a default judgment. We are therefore unable to see how the plaintiff is able to garner any support from *S Kaprow Co. Limited, supra.*

[52] *City Of Westminster, supra; MacQuarie Bank, supra;* and *Cannan, supra,* have been considered earlier in this judgment. These three authorities do not relate to the issue of election included in the amended defence which had been allowed earlier by this court in *HSBC Bank Malaysia Bhd* CA, *supra.* Hence, we are of the view that they are not of any assistance to the plaintiff.

[53] Reverting to the mainstream in the instant appeal, it is to be noted that the plaintiff has consistently mounted challenges to the first defendant's right to raise the issue of election in its amended defence. It was only after such challenges have failed, first in the High Court, then in the Court of Appeal and finally in the Federal Court, that the plaintiff made the impugned application in the High Court. The dismissal of the impugned application has now become the subject matter of the instant appeal.

[54] It is abundantly clear to us that the impugned application was made for the purpose of forestalling, pre-empting or preventing the first defendant from raising the issue of election in the amended defence at the trial, where the merits or otherwise thereof would have to be considered and determined in due course. The impugned application, if allowed, would have the effect of stifling or negating the earlier order of this court made in *HSBC Bank Malaysia Bhd, supra.* It is an obvious illustration of an abuse of the process of the court which should not be permitted and which O. 92 r. 4 seeks to prevent.

Mistake And Delay

[55] It was argued for the plaintiff that:

(1) the plaintiff's solicitors were mistaken in obtaining the default judgment against the second defendant, not being aware that it could result in the first defendant contending that the plaintiff is now estopped from claiming against the first defendant;

(2) the plaintiff had never intended to release the first defendant from liability based on the tort of conversion; and

(3) there was no delay on the part of the plaintiff in filing the impugned application.

[56] In response, it was contended for the first defendant that there was no mistake when the plaintiff's solicitors applied to enter judgment against the second defendant; and that there was considerable delay on the part of the plaintiff's solicitors in filing the impugned application.

[57] On the question of the existence or otherwise of the mistake on the part of the plaintiff's solicitors, we find it necessary to immediately emphasize that the default judgment has been obtained by the plaintiff at the instance of the plaintiff's solicitors who must have properly and meticulously considered the implications thereof. Had there been such a mistake, the plaintiff's solicitors would have, on 22 January 2001, refrained from sending the draft copy of the default judgment dated 16 January 2001 for approval by the first defendant's solicitors, who had duly approved and returned it to the plaintiff's solicitors for eventual perfection on 29 January 2001.

[58] Further, the plaintiff solicitors had apparently made no effort to rectify the mistake timeously. It was only after some 47 months ie from 29 January 2001 to 9 December 2004 that they took steps to file the impugned application. As they had not moved quickly to apply to set aside the default judgment, the irresistible inference is that they are holding affirmatively and positively to the default judgment. That delay in filing the impugned application is somewhat inordinate, and the act of the plaintiff's solicitors in obtaining the default judgment can hardly be construed as a mistake.

Conclusion

[59] On the facts and circumstances alluded to above, we are unable to find any error in the exercise of the discretion by the learned judge in dismissing the impugned application. Hence, we dismissed this appeal with costs and affirmed the decision of the High Court.

[60] By consent of the parties as alluded to above, the decision herein is binding on the parties in Civil Appeal No. 10.

[61] Deposits to the first defendant on account of taxed costs.